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C O N F I D E N T I A L STATE 019514

E.O. 12356: DECL: OADR
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SUBJECT: PKK AND "INSURGENCY"

REF: ANKARA 0285

1. CONFIDENTIAL - ENTIRE TEXT.

2. SUMMARY: THE PKK DOES NOT BECOME ENTITLED TO ANY OF THE GENEVA CONVENTIONS' BENEFITS BY THE U.S. USE OF THE TERM "INSURGENCY." THE 1949 GENEVA CONVENTIONS DID NOT/NOT CHANGE THE CUSTOMARY AND CONVENTIONAL LAWS OF WAR REGARDING "INSURGENCY," AND, THEREFORE, CHARACTERIZING THE PKK'S ACTIVITY AS A "SEPARATIST INSURGENCY" DOES NOT/NOT IMPLY THAT THE PKK ENJOYS A RECOGNIZED LEGAL STATUS. END SUMMARY.

3. MOST OF THE POINTS BELOW ARE DRAWN FROM A 1988 LEGAL MEMORANDUM SUBMITTED BY THE USG TO THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN THE CASE OF U.S.

4. SHAKUR. EMBASSY MAY PROVIDE THE FOLLOWING POINTS IN RESPONSE TO AMBASSADOR TURMEN'S COMMENTS (REFTEL).

4. BEGIN POINTS:

- SOME STATES RECOGNIZE A CATEGORY OF "INSURGENCY" BUT ONLY FOR DOMESTIC POLITICAL OR LEGAL REASONS, IN ORDER TO AVOID TREATING SOME REBELS AS MERE LAWBREAKERS. SUCH A PRACTICE, HOWEVER, IS SPORADIC AND, IN ANY EVENT' NOT A MATTER OF INTERNATIONAL LAW.
- THE CUSTOMARY LAW OF WAR THAT EXISTED BEFORE ADOPTION OF THE FOUR GENEVA CONVENTIONS OF 1949 DID NOT PURPORT TO REGULATE CIVIL WARS EXCEPT IN VERY NARROW CIRCUMSTANCES. UNDER THAT LAW, CERTAIN INTERNAL ARMED CONFLICTS COULD BECOME INTERNATIONAL ARMED CONFLICTS FOR PURPOSES OF THE LAWS OF WAR IF A STATE OF "BELLIGERENCY" WAS RECOGNIZED BY STATES.
- IN TRADITIONAL TERMINOLOGY, AN "INSURGENCY" WAS A REBEL MOVEMENT NOT ENTITLED TO PROTECTION UNDER THE LAWS OF WAR. "BELLIGERENCY" WAS A CONDITION THAT RESEMBLED AN ARMED CONFLICT BETWEEN STATES, WITH EACH PARTY ADMINISTERING TERRITORY ETC. (SEE BELOW). BELLIGERENCY WAS GOVERNED BY THE LAWS OF WAR WHICH REGULATED CONFLICTS BETWEEN STATES.
- THE TERM "INSURGENCY" APPLIED TO CONFLICTS LACKING THE FEATURES OF INTERSTATE CONFLICT. USE OF THE TERM HAS NEVER BEEN CONSIDERED AS CONFERRING STATUS ON THE PARTICIPANTS UNDER THE LAWS OF WAR.
- BELLIGERENCY EXISTED ONLY IF CERTAIN FACTUAL CONDITIONS WERE PRESENT: "... THE EXISTENCE OF A CIVIL WAR ACCOMPANIED BY A STATE OF GENERAL HOSTILITIES; OCCUPATION AND A MEASURE OF ORDERLY ADMINISTRATION OF A SUBSTANTIAL PART OF NATIONAL TERRITORY BY THE INSURGENTS; OBSERVANCE OF THE RULES OF WARFARE ON THE PART OF THE INSURGENT FORCES ACTING UNDER A RESPONSIBLE AUTHORITY; THE PRACTICAL NECESSITY FOR THIRD STATES TO DEFINE THEIR ATTITUDE TO THE CIVIL WAR."
- THIS TRADITIONAL TERMINOLOGY HAS FALLEN INTO DISUSE IN FAVOR OF THE TERMINOLOGY AND CONCEPTS USED IN THE FOUR GENEVA CONVENTIONS OF 1949 AND IN THEIR 1977 PROTOCOLS.
- BECAUSE OF THE FREQUENCY AND INTENSITY OF CIVIL WARS' THE STATES THAT MET IN GENEVA IN 1949 DECIDED TO ADOPT COMMON ARTICLE 3 TO GOVERN "ARMED CONFLICT NOT OF AN

INTERNATIONAL CHARACTER." ARTICLE 3 PROVIDES A GENERAL REQUIREMENT THAT PERSONS NOT TAKING AN ACTIVE PART IN HOSTILITIES BE TREATED HUMANELY, AND IT SPECIFICALLY PROHIBITS, AMONG OTHER THINGS, MURDER, TORTURE, HOSTAGE-TAKING AND HUMILIATING AND DEGRADING TREATMENT. HOWEVER, IT DOES NOT GRANT REBELS THE BENEFITS OF PRISONER-OF-WAR STATUS AND THUS IMMUNITY FROM PROSECUTION UNDER LOCAL LAW FOR LEGITIMATE COMBATANT ACTS. THUS. A REBEL IN A CIVIL WAR MAY BE PROSECUTED FOR MURDER IF HE KILLS A MEMBER OF THE REGULAR FORCES OF A STATE.

- IN ANY EVENT, APPLICATION OF ARTICLE 3 DOES NOT DEPEND ON WHETHER OR NOT AN "INSURGENCY" IS INVOLVED.

- AFTER THE CONVENTIONS WERE ADOPTED, SOME ARGUED THAT INTERNAL ARMED CONFLICTS COULD BECOME "INTERNATIONAL" ARMED CONFLICT IF "BELLIGERENCY" WERE RECOGNIZED BY STATES. IT IS CLEAR FROM THE PRACTICE OF STATES DURING THE PAST FOUR DECADES, HOWEVER, THAT STATES HAVE NOT ACCEPTED THIS THEORY UNDER THE CONVENTIONS.

- THE 1977 PROTOCOLS TO THE GENEVA CONVENTIONS CLASSIFY SOME INTERNAL ARMED CONFLICTS AS INTERNATIONAL AND THUS COVERED BY THE CONVENTIONS. THIS WAS LARGELY MOTIVATED BY THE DESIRE OF THIRD WORLD COUNTRIES (ESPECIALLY THOSE THAT HAD FOUGHT COLONIAL WARS) TO OBTAIN PRISONER-OF-WAR RIGHTS FOR THOSE WHO WERE FIGHTING IN SO-CALLED WARS OF NATIONAL LIBERATION. THEY SOUGHT TO CLASSIFY SUCH CONFLICTS AS INTERNATIONAL FOR PURPOSES OF THE LAWS OF WAR, IN LARGE PART BECAUSE OF THE FRUSTRATIONS WITH THE RIGID BUT SENSIBLE STANDARDS OF THE 1949 GENEVA PRISONERS OF WAR CONVENTION.

- PROTOCOL I' AS IT FINALLY EMERGED, PROVIDES IN ARTICLE 1 THAT SUCH CONFLICTS SHALL BE DEEMED TO BE INTERNATIONAL. THIS WAS A MAJOR REASON FOR THE U.S. REJECTION OF THE PROTOCOL. TURKEY ALSO HAD MAJOR PROBLEMS WITH ARTICLE 1 DURING THE NEGOTIATIONS OF THAT PROTOCOL. NEITHER THE UNITED STATES NOR TURKEY IS A PARTY TO PROTOCOL I.

- NONETHELESS, THE TERM "INSURGENCY" DOES NOT APPEAR IN THE 1977 PROTOCOLS. THE FACT THAT A GROUP IS CHARACTERIZED AS AN INSURGENCY WOULD NOT AFFECT ITS MEMBERS' STATUS UNDER THE PROTOCOLS.

- THUS. UNDER THE CUSTOMARY LAWS OF WAR, THE 1949 GENEVA CONVENTIONS AND THE 1977 PROTOCOLS' USE OF THE TERM "INSURGENCY" TO DESCRIBE THE PKK'S ACTIVITY DOES NOT IMPLY OR CONVEY ANY RIGHTS OR BENEFITS ON THE PKK. THEREFORE, THERE IS NO REASON FOR THE UNITED STATES NOT TO USE THE TERM SINCE, ACCORDING TO THE DICTIONARY, "INSURGENCY" ACCURATELY DESCRIBES THE PKK'S ACTIVITY.

END POINTS.

TARNOFF